

SAMUEL HOWARD,	)	
	)	
Petitioner,	)	2:93-CV-1209-LRH-LRL
	)	
vs.	)	
	)	<b>ORDER</b>
E.K. McDANIEL, <i>et al.</i> ,	)	
	)	
Respondents.	)	
	)	
	/	

## 1. Background.

On May 6, 1983, Howard was convicted of murder in the first degree with use of a deadly weapon and was sentenced to death in the Eighth Judicial District Court of Nevada. On December 15, 1986, the Nevada Supreme Court affirmed the judgment of conviction and sentence of death. On March 24, 1987, the Nevada Supreme Court denied Howard's petition for rehearing. On October 5, 1987, the United States Supreme Court denied his petition for writ of certiorari.

1           On October 28, 1987, Howard filed a petition for post-conviction relief in the state  
2 district court. On November 7, 1990, the Nevada Supreme Court affirmed the lower court's decision  
3 to deny relief. While the proceeding was pending, Howard filed a federal petition for habeas relief in  
4 this court (Case No. CV-N-88-0264-ECR). On June 23, 1988, the case was dismissed without  
5 prejudice.

6           On May 1, 1991, Howard submitted another federal habeas corpus petition that was  
7 subsequently filed and assigned Case Number CV-N-91-196-ECR. The respondents moved to  
8 dismiss the petition on the ground that it included unexhausted claims, and was therefore a "mixed"  
9 petition pursuant to *Rose v. Lundy*, 455 U.S. 509 (1982). Howard conceded that his petition was a  
10 mixed petition, and responded to the motion to dismiss by requesting a stay of the action to allow  
11 him to return to state court to exhaust his unexhausted claims. In an Order entered October 16, 1991,  
12 the court granted petitioner's request, and stayed the case. The case was closed administratively,  
13 subject to being reopened.

14           On December 16, 1991, Howard filed an "Amended Petition for Post-Conviction  
15 Relief" in the state district court. The state district court denied the amended petition. On March 9,  
16 1993, Howard's appeal to the Nevada Supreme Court appeal was dismissed. The United States  
17 Supreme Court denied his petition for a writ of certiorari.

18           On December 8, 1993, Howard returned to this court and submitted a *pro se* habeas  
19 corpus petition, initiating this action. Docket #1. The court appointed counsel for Howard. Docket  
20 #6. On May 8, 1995, Howard filed an amended petition. Docket #33. On October 16, 1995,  
21 respondents filed a motion to dismiss, or for a more definite statement. Docket #38. On September  
22 2, 1996, the court granted that motion, dismissed the amended petition, and required Howard to file a  
23 second amended petition that stated his claims in a non-conclusory manner. Docket #48.

24           On January 27, 1997, Howard filed a Second Amended Petition for Writ of Habeas  
25 Corpus. Docket #60. The following day, he filed a Statement of Exhaustion, wherein he conceded  
26 that several of his claims were unexhausted. Docket #61. On February 18, 1997, the court entered

1 an order requiring Howard to file a statement explaining why the unexhausted claims were not  
2 barred as an abuse of the writ. Docket #63. On August 16, 2001, after extensive and prolonged  
3 litigation on the issue, this court ultimately determined that, in view of the Supreme Court's holding  
4 in *Slack v. McDaniel*, 529 U.S. 472 (2000), Howard had not abused the writ. Docket #140.

5 On September 13, 2002, this court entered an order staying this action to allow  
6 Howard a final opportunity to exhaust remedies for his pending federal habeas claims. Docket #170.  
7 On December 20, 2002, Howard filed his third state petition for post-conviction relief. On October  
8 23, 2003, the state district court dismissed the petition on procedural grounds. On December 1,  
9 2004, the Nevada Supreme Court entered an order affirming the lower court's decision. On February  
10 23, 2005, this court lifted its stay and directed the Clerk to file Howard's Third Amended Petition for  
11 Writ of Habeas Corpus. Docket #188. On December 23, 2005, respondents filed the motion to  
12 dismiss that is now before the court for decision.

13 2. Procedural Default Standards.

14 A federal court will not review a claim for habeas corpus relief if the decision of the  
15 state court denying the claim rested on a state law ground that is independent of the federal question  
16 and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991). The  
17 Court in *Coleman* stated the effect of a procedural default as follows:

18 In all cases in which a state prisoner has defaulted his federal claims in  
19 state court pursuant to an independent and adequate state procedural  
20 rule, federal habeas review of the claims is barred unless the prisoner  
21 can demonstrate cause for the default and actual prejudice as a result of  
the alleged violation of federal law, or demonstrate that failure to  
consider the claims will result in a fundamental miscarriage of justice.

22 *Coleman*, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986). A state procedural  
23 bar is "independent" if the state court explicitly invokes the procedural rule as a separate basis for its  
24 decision. *McKenna v. McDaniel*, 65 F.3d 1483, 1488 (9<sup>th</sup> Cir.1995). A state court's decision is not  
25 "independent" if the application of a state's default rule depends on a consideration of federal law.  
26 *Park v. California*, 202 F.3d 1146, 1152 (9<sup>th</sup> Cir. 2000). Also, if the state court's decision fails "to

1 specify which claims were barred for which reasons,” the Ninth Circuit has held that the ambiguity  
2 may serve to defeat the independence of the state procedural bar. *Valerio v. Crawford*, 306 F.3d 742,  
3 775 (9<sup>th</sup> Cir. 2002); *Koerner v. Grigas*, 328 F.3d 1039, 1050 (9<sup>th</sup> Cir. 2003).

4 A state procedural rule is "adequate" if it is "clear, consistently applied, and  
5 well-established at the time of the petitioner's purported default." *Calderon v. United States Dist.*  
6 *Court*, 96 F.3d 1126, 1129 (9<sup>th</sup> Cir.1996) (citation and internal quotation marks omitted). In *Bennett*  
7 *v. Mueller*, 322 F.3d 573, 585-86 (9<sup>th</sup> Cir. 2003), the court of appeals announced a burden-shifting  
8 test for analyzing adequacy. Under *Bennett*, the State carries the initial burden of adequately  
9 pleading “the existence of an independent and adequate state procedural ground as an affirmative  
10 defense.” *Id.* at 586. The burden then shifts to the petitioner “to place that defense in issue,” which  
11 the petitioner may do “by asserting specific factual allegations that demonstrate the inadequacy of  
12 the state procedure, including citation to authority demonstrating inconsistent application of the  
13 rule.” *Id.* Assuming the petitioner has met his burden, “the ultimate burden” of proving the  
14 adequacy of the state bar rests with the State, which must demonstrate “that the state procedural rule  
15 has been regularly and consistently applied in habeas actions.” *Id.*

16 3. Discussion.

17 Respondents’ procedural default argument is based on the following syllogism. First,  
18 Howard has admitted that his third state petition and his current federal petition are virtually  
19 identical. Second, the Nevada Supreme Court clearly denied Howard’s third state petition on  
20 adequate and independent procedural grounds. Thus, any claim in his current federal petition that  
21 was unexhausted when he filed his third state petition is now subject to the doctrine of procedural  
22 default.

23 Respondents further note that Howard acknowledged, in the Statement of Exhaustion  
24 filed with his second amended petition, that most of the claims in that petition were unexhausted –  
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26

1 specifically, Claims 4, 6, 7, 8, 9, 11, 12, 13, 15, 16, part of 17, part of 18, 19, 20, 21, 22, and 23,<sup>1</sup>  
2 which means that those claims were unexhausted when the third state petition was filed. In addition,  
3 respondents argue that there are several other claims that may have been unexhausted as well –  
4 specifically, Claims 1, 2, 3, 5, 10, 14, 17, and 18.

5 In affirming the lower court's denial of Howard's third state post-conviction petition,  
6 the Nevada Supreme Court concluded that three separate procedural rules barred the petition, Nev.  
7 Rev. Stat. § 34.726(1), Nev. Rev. Stat. § 34.800(1), and Nev. Rev. Stat. § 34.810(2). Docket #187,  
8 Exhibit A, p. 3-5. Under Nev. Rev. Stat. § 34.726(1), a petition is untimely if filed later than one  
9 year after the entry of the judgment of conviction. Nev. Rev. Stat. § 34.800(1) provides that a court  
10 may dismiss a petition if undue delay prejudices the State's ability to either respond to the petition  
11 or retry the petitioner. A rebuttable presumption of prejudice arises after five years between the  
12 direct appeal decision and the filing of the petition. Nev. Rev. Stat. § 34.800(2). Under Nev. Rev.  
13 Stat. § 34.810(2), a second or successive petition must be dismissed if "it fails to allege new or  
14 different grounds for relief and . . . the prior determination was on the merits or, if new and  
15 different grounds are alleged, . . . the failure of the petitioner to assert those grounds in a prior  
16 petition constituted an abuse of the writ." Sections 34.726 and 34.810 each have cause and  
17 prejudice exceptions; and, § 34.800 has exceptions for newly discovered claims and fundamental  
18 miscarriages of justice.

19 The Nevada Supreme Court rejected Howard's various arguments asserting that his  
20 petition should not have been dismissed on procedural grounds. Docket #187, Exhibit A, p. 5-9.  
21 The court's decision did not involve, expressly or implicitly, an interwoven or antecedent ruling on  
22 federal law. *Id.* Thus, it rested on state law grounds that were independent of any federal question  
23 presented by Howard's petition. *See Park*, 202 F.3d at 1152-53; *La Crosse v. Kernan*, 244 F.3d  
24 702, 706-07 (9<sup>th</sup> Cir. 2001). And, for reasons discussed below, this is not a case in which ambiguity

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26 <sup>1</sup> The claims in Howard's current federal petition correspond with, and are nearly identical to, the claims  
in his second amended petition, except that Howard has added one additional sub-claim of ineffective  
assistance of counsel – Claim 17(22).

1 as to which bar was applied to which particular claims defeats the independence of the state  
2 procedural bar.

3 With regard to the adequacy requirement, respondents point out that the Ninth  
4 Circuit, in *Moran v. McDaniel*, 80 F.3d 1261, 12689 (9<sup>th</sup> Cir. 1996) and more recently in *Valerio v.*  
5 *Crawford*, 306 F.3d 742, 778 (9<sup>th</sup> Cir. 2002), upheld the viability of Nev. Rev. Stat. § 34.726(1) as a  
6 procedural bar in capital cases. Respondents do not rely on Nev. Rev. Stat. § 34.800 at all, and  
7 concede that there is some question as to whether as Nev. Rev. Stat. § 34.810 suffices as a  
8 procedural bar to federal court review in capital cases. *See Valerio*, 306 F.3d at 778. Nonetheless,  
9 by pleading § 34.726(1) as a procedural bar and citing to *Moran*, respondents have met their initial  
10 burden under *Bennett*. Because Howard has not filed an opposition, respondents need not make any  
11 further showing with respect to the adequacy of § 34.726(1). *Bennett*, 322 F.3d at 586.

12 The possible inadequacy of Nev. Rev. Stat. § 34.810 as a procedural bar in capital  
13 cases does not undermine a conclusion that the relevant claims are procedurally barred from federal  
14 court review. Unlike in *Valerio* and *Koerner*, where the state court relied on two mutually  
15 inconsistent procedural bars without specifying which bar applied to which claim, the Nevada  
16 Supreme Court in Howard's case clearly applied the timeliness bar to his entire petition. Because  
17 the application of Nev. Rev. Stat. § 34.726 was not inconsistent with the application of Nev. Rev.  
18 Stat. § 34.810, this court is not required to guess which of two mutually exclusive grounds, one  
19 adequate and one not, was applied to a particular claim. *See Koerner*, 328 F.3d at 1053.

20 Howard did, in fact, admit that his third state petition was identical to his current  
21 federal petition. Docket #187, p. 2. Because all the claims in his third state petition were denied by  
22 the Nevada Supreme Court based on adequate and independent state procedural rule, it follows that  
23 any claim in that petition that had yet to be exhausted in state court when the petition was filed is  
24 now procedurally barred from federal court review on the merits. To avoid this result, Howard  
25 must demonstrate either (1) cause for the default and actual prejudice resulting from the alleged  
26 federal law violation or (2) that failure to consider the claim will result in a fundamental miscarriage

1 of justice. *Coleman*, 501 U.S. at 750; *Harris v. Reed*, 489 U.S. 255, 262 (1989). Because Howard  
2 has not opposed respondents' motion to dismiss, the court finds that he has not met either burden.

3 All that remains, therefore, is to determine which of Howard's claims had yet to be  
4 exhausted when he filed his third state petition. Given the absence of any intervening state  
5 proceeding, the claims for which Howard conceded lack of exhaustion when he filed his second  
6 amended federal petition were still unexhausted when he filed his third state petition. As noted  
7 above, Howard has presented the same, identically-numbered claims (save for the addition of Claim  
8 17(22)) in his second amended federal petition, his third state petition, and his current federal  
9 petition. Therefore, he cannot dispute that Claims 4, 6, 7, 8, 9, 11, 12, 13, 15, 16, part of 17, part of  
10 18, 19, 20, 21, 22, and 23 in his current petition had yet to be exhausted when he filed his third state  
11 petition. See Docket #61.

12 As for the remaining claims, the court has carefully reviewed the state court record  
13 and finds that, for the reasons set forth below, Claims 1, 3, 5, 17 (in part), and 18 had also yet to be  
14 exhausted when Howard filed his third state petition. To exhaust a ground for relief, a petitioner  
15 must fairly present that ground for relief to the state's highest court, and must give that court the  
16 opportunity to address and resolve it. *See Duncan v. Henry*, 513 U.S. 364, 365 (1995); *Keeney v.*  
17 *Tamayo-Reyes*, 504 U.S. 1, 10 (1992). The "fair presentation" requirement is satisfied when the  
18 claim has been presented to the highest state court by describing the operative facts and the legal  
19 theory upon which the federal claim is based. *See Anderson v. Harless*, 459 U.S. 4, 6 (1982);  
20 *Batchelor v. Cupp*, 693 F.2d 859, 862 (9<sup>th</sup> Cir. 1982), *cert. denied*, 463 U.S. 1212 (1983).

21 To fairly present a federal claim to the state court, the petitioner must alert the court  
22 to the fact that he asserts a claim under the United States Constitution. *Hiivala v. Wood*, 195 F.3d  
23 1098, 1106 (9<sup>th</sup> Cir. 1999) (citing *Duncan*, 513 U.S. at 365-66), *cert. denied*, 529 U.S. 1009 (2000).  
24 The mere similarity of claims of state and federal error is insufficient to establish exhaustion.  
25 *Hiivala*, 195 F.3d at 1106, (citing *Duncan*, 513 U.S. at 366); *see also Lyons v. Crawford*, 232 F.3d  
26 666, 668-69 (9<sup>th</sup> Cir. 2000), *as modified by*, 247 F.3d 904 (9<sup>th</sup> Cir. 2001); *Shumway v. Payne*, 223

1 F.3d 982, 987 (9<sup>th</sup> Cir. 2000). The petitioner must have "characterized the claims he raised in state  
2 proceedings *specifically* as federal claims." *Lyons*, 232 F.3d at 670. This is accomplished either by  
3 referencing a specific provisions of the federal constitution or by citing to either a federal or state  
4 case involving the legal standard for a federal constitutional violation. *See id.*; *Peterson v. Lampert*,  
5 319 F.3d 1153, 1158 (9<sup>th</sup> Cir. 2003) (en banc). "[G]eneral appeals to broad constitutional  
6 principles, such as due process, equal protection, and the right to a fair trial, are insufficient to  
7 establish exhaustion." *Hiivala*, 195 F.3d at 1106, (citing *Gray v. Netherland*, 518 U.S. 152, 162-63  
8 (1996); *see also Shumway*, 223 F.3d at 987.

9 In Claim 1, Howard alleges a violation of his constitutional right to a fair trial  
10 because the state court failed to sever a robbery count (Count I) from another robbery count (Count  
11 II) and the murder count (Count III). Prior to his third state petition, Howard presented a similar  
12 claim in his direct appeal, but, in doing so, failed to argue a federal law violation. Exhibit #32,<sup>2</sup> p.  
13 11-14. Claim 1 was not presented in state court until his third state petition.

14 In Claim 3, Howard alleges that several of his constitutional rights, including his  
15 right to due process and a speedy trial, were violated when his trial, which was scheduled to begin  
16 January 10, 1983, was continued over his personal and specific objection to the continuance. In his  
17 Statement of Exhaustion, Howard claimed to have exhausted his state court remedies for this claim  
18 in his second state post-conviction proceeding. Docket #61, p. 2. However, he failed to present to  
19 the state court the operative facts upon which he now relies. Exhibits #97/98/103. In addition,  
20 Claim 3 also contains legal theories for federal relief that were not presented to the state court. *Id.*  
21 Thus, Claim 3 was not presented in state court until his third state petition.

22 In Claim 5, Howard alleges a violation of his constitutional right to a fair trial  
23 because the state court failed to give his requested jury instruction that the testimony of an  
24 accomplice ought to be viewed with distrust. Prior to his third state petition, Howard presented a  
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26 <sup>2</sup> Unless otherwise noted, exhibits referenced herein were filed with respondents' motion to dismiss,  
or for a more definite statement, and are located at docket #38/39.



1 similar claim in his direct appeal, but, in doing so, failed to argue a federal law violation. Exhibit  
2 #32, p. 16-17. Claim 5 was not presented in state court until his third state petition.

3 In Claim 17, Howard alleges that his constitutional right to effective assistance of  
4 counsel was violated as a result of counsel's failure to adequately prepare for trial, to discover and  
5 present available evidence, and to adequately argue his case on the basis of evidence that was  
6 presented. In addition to claiming a conflict of interest (Claim 17(2)), Howard supports his claim of  
7 ineffectiveness by identifying 21 specific failures or omissions by counsel.

8 Prior to his third state petition, Howard raised ineffective assistance of counsel  
9 claims in the Nevada Supreme Court in all three of his prior state court proceedings – i.e., his direct  
10 appeal and first two state petitions. Exhibits #32/88/97. As conceded in his Statement of  
11 Exhaustion, however, he did not present in those proceedings all of the operative facts he relies  
12 upon in his current federal petition. Docket #61, p. 3. His third state petition was the first time he  
13 raised allegations that counsel was ineffective for failing to seek a hearing on his competence to  
14 stand trial (Claim 17(7)), to seek a suppression hearing (Claim 17(8)), to pursue an insanity defense  
15 (Claim 17(9)), to object to certain jury instructions (Claim 17(10, 17, 21)), and to object to the trial  
16 court's limitation of mitigating circumstances to be considered by the jury (Claim 17(20)). In  
17 addition, Howard waited until his third state petition to fault counsel for failing to obtain or present  
18 certain evidence; to wit: information from Howard's attorney in a California robbery case (Claim  
19 17(3)), the transcripts from that robbery trial (Claim 17(5)), various records from the Clark County  
20 Detention Center (Claim 17(7, 11, 13)), and certain records from the California State Prison  
21 Archives Division (Claim 17(12)). Lastly, two other claims not presented in state court until the  
22 third state petition are Howard's contentions that counsel was ineffective for (1) failing to refute the  
23 prosecution's argument about future dangerousness by calling jail personnel and fellow inmates as  
24 witnesses and presenting psychiatric evidence (Claim 17(19)), and (2) failing to adequately  
25 investigate Howard's background and present certain information about his past (Claim 17(22)).

26 In Claim 18, Howard alleges that his constitutional right to effective assistance of

1 counsel was violated as a result of appellate counsel's failure raise various claims in his direct  
2 appeal. He identifies thirteen arguments that counsel should have raised on direct appeal. Prior to  
3 his third state petition, Howard presented an ineffective assistance of appellate counsel claim to the  
4 Nevada Supreme Court in appealing the denial of his first state petition. Exhibit 88. In doing so,  
5 however, he did not attribute appellate counsel's ineffectiveness to her failure to bring any of the  
6 thirteen arguments identified in Claim 18. Thus, Claim 18 was not presented in state court until his  
7 third state petition.

8 In summary, this court finds that Claims 1, 3 through 9, 11, 12, 13, 15, 16, 17(3, 5-  
9 13, 17, and 19-22), and 18 through 23 were not presented to the state court until Howard filed his  
10 third state petition for post-conviction relief. For the reasons set forth above, this court is barred by  
11 the doctrine of procedural default from reviewing those claims on the merits.

12 **IT IS THEREFORE ORDERED** that respondent's motion to dismiss (docket  
13 #206) is GRANTED. Claims 1, 3 through 9, 11, 12, 13, 15, 16, 17(3, 5-13, 17, and 19-22), and 18  
14 through 23 of the third amended petition for writ of habeas corpus (docket #189) are DISMISSED  
15 as procedurally barred from review by this court.

16 **IT IS FURTHER ORDERED** that respondents shall have **sixty (60) days** from the  
17 date this order is filed in which to file and serve an **answer** to Claims 2, 10, 14, and 17(1, 2, 4, 14-  
18 16, and 18) of the third amended petition.

19 **IT IS FURTHER ORDERED** that, in all other respects, the schedule set forth in  
20 the scheduling order entered on March 25, 2005 (docket #191), shall remain in effect.

21 DATED: July 25, 2006.

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LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE  
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